EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

91-677

NO.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

IRENE SIMON

Petitioner

vs.

NORBERT L. SIMON
HYLON ADAMS
CAROLYN WHISENHUNT
JOHN DICKSON
MARK LEVBARG
KEN ODEN/JIM MCCORMACK
THE UNITED STATES COURT OF APPEALS

Respondents

PETITION FOR WRIT OF CERTIORARI

To the United States Fifth Circuit
Court of Appeals

Irene Simon
Pro Se
10414 Slaughter Creek
Austin, Texas 78748
(512) 282-6250

QUESTION PRESENTED

Whether the granting of defendant's Motion for Dismissal based on failure to state a claim can be granted after two settings for a jury trial were granted to Plaintiff based on the merits of this case?

NO.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

IRENE SIMON

Petitioner

vs.

NORBERT L. SIMON ET. AL.

Respondents

PETITION FOR WRIT OF CERTIORARI

To the United States Fifth Circuit
Court of Appeals

Irene Simon
Pro Se
10414 Slaughter Creek
Austin, Texas 78748
(512) 282-6250

QUESTION PRESENTED

Whether the granting of defendants' Motion for Dismissal based on failure to state a claim can be granted after two settings for a jury trial were granted to Plaintiff based on the merits of this case?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1991

IRENE SIMON

Petitioner

vs.

NORBERT L. SIMON, ET. AL.

Respondents

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit, To the Honorable Chief Justice of the United States and To the Honorable Associate Justices of the Supreme Court of the United States:

Irene Simon, the Petitioner herein, prays that a Writ of Certiorari be issued to review the judgment issued as a mandate of the United States Fifth Circuit Court of Appeals for the Federal District Court entered in the above-entitled action on April 22, 1991.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit for judgment was issued as mandate on April 22, 1991 and is contained in Exhibit A hereto.

The opinion of the United States Court of Appeals for the Fifth Circuit denying Plaintiff's Petition for Rehearing filed April 10, 1991 is contained in Exhibit B hereto.

The opinion of the United States Court of Appeals for the Fifth Circuit Appeal for the United States District Court for the Western District of Texas (A 88 CA 728) filed on March 21, 1991 is contained in Exhibit C hereto.

JURISDICTION

The opinion of the United States Court of Appeals Judgment was entered as mandate April 22, 1991.

The jurisdiction of the United States Supreme Court is involved under 28 United States Code 1254 and 42 U.S.C. #1983.

STATEMENT OF THE CASE

In August, 1988, Plaintiff filed a civil rights action against Norbert Simon et. al. because of violation of her civil rights in a divorce action in Travis County, Texas. Two parties in the original lawsuit did not reply in time. Therefore, Plaintiff petitioned the District Court three times for a default. Judge Nowlin denied default three times and ordered Plaintiff to proceed with the merits of the case on March 8, 1989 in accordance with Azzopardi v. Ocean Drilling & Exploration Co. 742 F.2d 890, 895 (5th Circ. 1984).

On March 6, 1989, Judge Nowlin ordered all parties to submit a Scheduling Order to the Court within ten days. Plaintiff provided the Court with a Scheduling Order on March 15, 1989. This order was accepted by all parties

In order to prepare her amended complaint along with the affidavit and documents which would support her contentions, Plaintiff went to the Travis County Courthouse to examine two divorce cases which had been used interchangeably in one case by both attorneys in this action. Divorce Cause 339,502 was a divorce action brought by Defendant Norbert Simon against Plaintiff in September, 1982 and dismissed by the order of Judge Jon Wisser on August 30, 1984 at the request of Defendant Norbert Simon. Divorce Cause 382,708 was filed by Defendant Norbert Simon in August, 1985 for the same period of time as the Dismissed Cause 339,502.

Two documents were filed on Dismissed Cause Number 339,502 in 1985 over a year after the order of Judge Wisser to dismiss. These two were:

Notice of Setting for Merits filed on October 30, 1985 and set for December 10, 1985; and Notice of Setting for Merits filed on January 28, 1986 scheduled for February 18, 1986. Even though Plaintiff had several copies of these documents in her possession, there was no record of these documents in either of the files and they were not listed on either of the dockets sheets.

On March 22, 1989, Plaintiff took a copy of each of these documents out of her personal file, took them to a clerk in Travis County Courthouse and asked her to locate these documents because of possible misfiling. She was told that the documents in her possession were government documents. Plaintiff advised the clerk that these documents had been in her file. She then left the courthouse and proceeded down the street towards her car. Three male clerks from

Travis County Courthouse stopped her and threatened to have her prosecuted for a felony because she had "stolen" documents from a file in the Courthouse unless she gave them up immediately. Plaintiff and these clerks went back to the Courthouse and asked Sheriff Ames to help sort out the problem. Sheriff Ames took the documents from Plaintiff and made out an Incident Report. Plaintiff asked Sheriff Ames to provide her with the name and/or number of the law that she was supposed to have broken and he provided her with his card on which was written "Tampering with Government Files." Plaintiff obtained a copy of the Texas Criminal Code 37.10 which states as follows:

Ch. 37: Perjury: Other Falsification.

(a) A person commits an offense if he:

(1) knowingly makes a false entry in, or a false alteration of, a governmental record;

(2) makes, presents, or uses any

record, document, or thing with knowledge of its falsity with the intent that it be taken as a genuine governmental record;

(3) intentionally destroys, conceals, removes, or otherwise impairs the verity, legibility, or availability of a governmental record."

On March 27, 1989, Plaintiff purchased a copy of the incident report number 89-7172. She called the Criminal Investigation Office a number of times and requested that a full investigation be made to clear her name of this charge and to continue with her case. She was told that they would "get to it." However, no investigation was forthcoming.

Since there was no information available on the outcome of this investigation, Plaintiff had to continue with her case because of the time frame imposed by the Scheduling Order. Among the 37 documents filed with the affidavit which was included as a part

of the Amended Lawsuit on May 9, 1989, there was a copy of this Criminal Code 37.10, the two documents in question, and the docket sheet for dismissed cause number 339,502.

Plaintiff completed the rest of the filings on the Scheduling Order, including Motions filed; Discovery; a request for a Pretrial Conference (Rules & Regulations 16), and finally, on June 13, 1989, a Demand for a Jury Trial, according to Rules and Regulations 38.

On April 4, 1990, Magistrate Capelle was ordered to review this case in preparation for a jury trial. He ordered Plaintiff to submit to an oral deposition with Travis County before May 1, 1990. Plaintiff attended this deposition with several witnesses and her own tape recorder on April 27, 1990.

The District Court set a jury trial on April 12, 1990 for June 25,

1990 at 9:30 a.m. In order to prepare for her jury trial date, Plaintiff went to the Sheriff's Office on June 5, 1990 to obtain the most current incident report for placement in the court files and provide a copy to all defendants. She was told that she could not have a copy because she was a "suspect" in the felony. She went over to see Lt. Nelson, the head of the Criminal Investigations Division for Travis County.

Lt. Nelson told her that there had never been an investigation and that a court order would be needed before he would release a copy of this report to her. Plaintiff obtained eight federal subpoenas to be issued to various witnesses, including Lt. Nelson. However, when the process server attempted to serve Lt. Nelson, it was discovered that he was on vacation and

not expected back until late June 22, 1990. His subordinate, Sgt. Beck refused to accept the subpoena for him. Plaintiff then went back to the Federal Court to get another subpoena for Sgt. Beck to appear with the report at the jury trial.

On June 22, 1990, Plaintiff received a notice in the mail from the District Court that her jury trial date of June 25, 1990 had been moved to July 30, 1990. While Plaintiff was preparing to issue new subpoenas to all witnesses, Judge Nowlin rendered the order to dismiss because of a frivolous suit on June 29, 1990.

Plaintiff appealed this ruling to the Fifth Circuit Court of Appeals, asking that the case be remanded for a jury trial. On July 9, 1990, while she was preparing her brief for this Court, she asked a friend, Ms. Mary Graham who was not a suspect, to purchase a copy of

this incident report for her. Ms. Graham was told that the Sheriff's Office no longer had the incident report but that it could be found in the Travis County Criminal Files office. Plaintiff and Ms. Graham went to the courthouse of Travis County and asked to see this file. A clerk checked in the computer records and found that only Plaintiff's name and birthdate had been entered. Everything else had been erased.

On March 21, 1991, the fifth Circuit Court of Appeals ruled in favor of the Defendants. (Please see Exhibit C). Plaintiff then filed a Motion to Rehear in this Court and again the Fifth Circuit Court of Appeals refused to grant a rehearing on April 10, 1991. (Please see Exhibit B). Finally, on April 22, 1991, the Fifth Circuit Appeals Court issued its Judgment. (Please see Exhibit A).

REASONS FOR GRANTING WRIT

The Fifth Circuit Court maintained that since Plaintiff "failed to state a claim" that the order to dismiss for a frivolous suit was proper. Also, Mrs. Simon was not entitled to an evidentiary hearing or a jury trial on claims that are frivolous.

However, "failing to state a claim" is a demurrer. (Please see Barron's Legal Dictionary, page 126). According to Federal Rules and Regulations Page 7(c): Demurrers, Pleas, Etc. Abolished. Demurrers, pleas, and exceptions for insufficiency of a pleading shall not be used."

The Fifth Circuit Appeals Court also stated that the Federal Court cannot intervene "in a request for a review of state court actions by filing complaints about those actions in lower federal courts cast in the form of civil

rights suits." However, Federal Rules and Regulations 1443 and 1343(3) seem to state otherwise. Just recently, this Honorable Court intervened in two state divorce actions and the findings of these courts. Jeanne Farrey, FKA Jeanne Sanderfoot, Petitioner v. Gerald J. Sanderfoot, No. 90-350, 5-21-91 and Dwight H. Owen, Petitioner v. Helen Owen, No. 89-1008, 5-21-91. According to an article in the Austin American Statesman dated June 7, 1991 "A Federal judge (Marvin Shoob of Atlanta) ruled Thursday that a black senior and his white classmate should share the title of valedictorian at a high school where the dispute over the top graduate has heightened racial tensions." These examples show that the Federal court has honored its obligation to ensure that the State Courts abide by the Constitution of the United States that

provides every citizen with a fair and impartial trial.

Plaintiff is acting in the capacity of Pro Se and knows she is not an attorney. However, according to Haines v. Kerner 92 S. 594, 596, "Allegations asserted by Appellant against the Appellees for the opportunity to offer supporting evidence, however inartfully pleaded...and it has been concluded that a person should be entitled to offer proof."

The Fifth Circuit Appeals Court then stated that "Plaintiff had made "incomprehensible'allegations...regarding being accused of tampering with government documents" and that the "issue will not be considered because it is presented for the first time on appeal." Hobbs v. Blackburn, 752 F2.d 1079, 1083 (5th Circ.), cert. denied 478 U.S. 838 (1985).

Plaintiff can show that she documented State Criminal Code 37.10 "verbatim" in her amended lawsuit attaching the two documents and the docket sheet which were involved for the Court's information.

If the Plaintiff had been permitted to continue with her trial on July 30, 1991, she would have had more than enough time to present the transcripts of the oral deposition from Travis County to further prove her allegations of civil rights violations in Travis County Court, eight creditable witnesses, and the incident report along with any investigation which might have been completed by the Criminal Investigation Division of Travis County, Texas. Instead, Plaintiff was prevented from presenting her witnesses and other evidence by Judge Nowlin's Order to Dismiss because of a frivolous suit. A

rule of law which would shut out evidence in a party's favor and thus deny him the opportunity to a fair trial, results in a denial of due process. Powlowski v. Wullich, 366 N.Y.S. 2d 895.

According to Castellano v. Travelers Ins. Co. 305 So. 2.d F. Supp., "Due process of law clauses of state and federal constitutions are standing guarantees of substantial justice and prevent such capricious or arbitrary actions as would prevent litigant from having a substantially fair trial."

CONCLUSION

Plaintiff respectfully submits to this Honorable Court that she is entitled to a jury trial to ensure a fair and impartial hearing and PRAYS that she will be granted a Writ of

Certiorari for a jury trial in the Federal District Court in Austin, Texas.

DATED: 7-1-91.

Respectfully submitted,

Irene Simon

IRENE SIMON, PRO SE

EXHIBITS

Exhibit A - JUDGMENT ISSUED AS MANDATE

Exhibit B - DENIAL OF REHEARING

Exhibit C - APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS (No. 90-8436) (SUMMARY CALENDAR)

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 90-8436
Summary Calendar

D. C. Docket No. A 88 CA 718

IRENE SIMON

Plaintiff-Appellant,

versus

NORBERT L. SIMON, ET. AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Texas

Before KING, GARWOOD, and DUHE, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the record on appeal and was taken under submission on the briefs on file.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed.

EXHIBIT A

IT IS FURTHER ORDERED that Plaintiff-Appellant pay to Defendants-Appellees the cost on appeal to be taxed by the Clerk of this Court.

March 21, 1991

ISSUED AS MANDATE: April 22, 1991.

THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 90-8436

IRENE SIMON

Plaintiff-Appellant.

versus

NORBERT L. SIMON, ET. AL.,

Defendants-Appellees.

Appeal from the United States District Court for the Western District of Texas

---

ON PETITION FOR REHEARING

(April 10, 1991)

Before KING, GARWOOD AND DUHE, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and

EXHIBIT B

numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

Walt Garwood

United States Circuit Judge

CLERK'S NOTE:
SEE FRAP AND
LOCAL RULES 41
FOR STAY OF
THE MANDATE.

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 90-8436
Summary Calendar

IRENE SIMON,

Plaintiff-Appellant,

versus

NORBERT L. SIMON, ET.AL.,

Defendants-Appellees

Appeal from the United States District Court
for the Western District of Texas
(A 88 CA 728)
(March 21, 1991)

Before KING, GARWOOD and DUHE, Circuit Judges. (1)

PER CURIAM:

Plaintiff-appellant Irene Simon (Mrs. Simon) filed this pro se civil rights suit in August 1988 to recover compensatory and punitive damages in the sum of $10,000,000 for alleged violations of her civil rights stemming from a final judgment of divorce

EXHIBIT C

divorce rendered by the 331st District Court of Travis County, Texas, in February, 1986. Mrs. Simon named as defendants in her original complaint her ex-husband, Norbert L. Simon; Hylon L. Adams, her attorney-of-record during the divorce proceedings; and Travis County, Texas. In an amended complaint filed in May 1989, Mrs. Simon named Carolyn Whisenhunt, Norbert Simon's divorce attorney, and John Dickson, Travis County District Court Clerk, as additional defendants.

Mrs. Simon alleged that the defendants had participated in a "vicious conspiracy" to deprive her of her right to a jury trial in her divorce action. Mrs. Simon further alleged that she was forced by the conspiracy to accept a no-fault divorce even though accepting such a divorce "was totally against the religious and personal views of the plaintiff[.]"

The magistrate to whom the case was assigned filed three separate reports, each dealing with dispositive motions filed by the various defendants, and all of which recommended that Mrs. Simon's lawsuit be dismissed. The district court adopted the magistrate's reports and recommendations, with the following modifications: (1) defendant Whisenhunt's motion to dismiss for failure to state a claim was granted, rather than her alternative motion for summary judgment; (2) the complaints against the remaining defendants, which the magistrate had dismissed for failure to state a claim, were dismissed for the additional reason that they were frivolous; (3) the magistrate's recommendation that sanctions be assessed against Mrs. Simon was denied. Judgment was rendered accordingly, and Mrs. Simon filed a timely notice of appeal.

A review of the complaint and amended complaint in this lawsuit shows that the

complaint in this lawsuit shows that the matters concerning which Mrs. Simon complains relate to the divorce decree to which she consented, as reflected by, inter-ualia, the copy of divorce decree bearing Mrs. Simon 's signature "approved as to form and substance," which she filed below with her affidavit in support of her amended complaint. This does not, however, suffice to state a claim of constitutional magnitude.

"[L]itigants may not obtain review of state court actions by filing complaints about those actions in lower federal courts cast in the form of civil rights suits." Hale v. Harney, 786 F.2d 688, 691 (5th Cir. 1986). This principle also extends to other causes of action in which "the constitutional claims presented [in federal court] are inextricably intertwined with the state court's' grant or denial of relief." Id. (quoting District of Columbia Court of

Appeals v. Feldman, 460 U.S. 462, 483 n.16 (1983).

Mrs. Simon's principal contention is that the defendants conspired against her to deny her a jury trial in the divorce proceedings and to force her to accept the divorce decree. Mrs. Simon did no more, however, than provide the district court with conclusory allegations of such a conspiracy. Mere conclusory allegations of conspiracy cannot, without reference to material facts, state a claim of substantial conspiracy under 42 U.S.C. $ 1983. Brinkman v. Johnson, 793 F.2d 111, 113 (5th Cir. 1986); Hale, 786 F.2d at 690. As a result, the dismissal of the lawsuit as frivolous was proper.

Mrs. Simon argues that she was entitled to a jury trial in the district court below, especially since a trial date had been set prior to the dismissal of her lawsuit. In light of the frivolous nature

of Mrs. Simon's lawsuit, this issue is meritless. Mrs. Simon is not entitled to an evidentiary hearing or a jury trial on claims that are frivolous.

Mrs. Simon's brief on appeal makes certain virtually incomprehensible allegations concerning suppression of evidence or the like, which appear to be unrelated to the divorce action claims. Mrs. Simon alleges, for the first time on appeal, that she was accused of the state crime of tampering with government files, and that the clerk;s office of Travis County, together with the other defendants, somehow destroyed the files concerning her "crime."

Even making the highly dubious arguendo assumption that Mrs. Simon had managed to state a proper claim in this respect, the issue will not be considered because it is presented for the first time on appeal. See Hobbs v. Blackburn 752 F.2d

1079, 1083 (5th Circ.) cert. denied, 474 U.S. 838 (1985).

The district court correctly dismissed Mrs. Simon's suit and the judgment below is

AFFIRMED

*(1) Local Rule 47.5 provides: "The publication of the opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the Appellant's Writ of Certiorari is being sent by certified mail return receipt requested to the following:

Mr. Hylon Adams
708 Colorado
Brown Building, Suite 613
Austin, Texas 78701

Ms. Carolyn Whisenhunt
910 West Avenue
Austin, Texas 78701

Mr. John Dickson
P. O. box 1748
Austin, Texas 78767

Mr. Mark Levbarg
910 West Avenue
Austin, Texas 78701

Messrs. Ken Oden/Jim McCormack
P. O. Bos 1748
Austin, Texas 78767

The United States Court of Appeals
for the Fifth Circuit
New Orleans, Louisiana

Respectfully submitted on this the 1st day of July, 1991.

Irene Simon

Irene Simon
10414 Slaughter Creek
Austin, Texas 78748
(512) 282-6250

EXHIBITS: PART II

Exhibit D - JUDGMENT TO DISMISS

Exhibit E - ORDER TO DISMISS

Exhibit F - REPORT & RECOMMENDATION OF UNITED STATES MAGISTRATE JUNE 12, 1990.

Exhibit G - INTERIM REPORT & RECOMMENDATION OF THE UNITED STATES MAGISTRATE MAY 21, 1990.

Exhibit H - ORDER DENYING SANCTIONS FOR TRAVIS COUNTY.

Exhibit I - INTERIM REPORT & RECOMMENDATION OF THE UNITED STATES MAGISTRATE APRIL 12, 1990.

Exhibit J - ORDER DENYING SANCTIONS FOR CAROLYN WHISENHUNT

Exhibit K - ORDER FOR PENDING AND
FUTURE DISPOSITIVE MOTIONS
APRIL 3, 1990.

Exhibit L - ORDER DENYING FILING OF
PRE-TRIAL ORDER
APRIL 3, 1990.

Exhibit M - ORDER RE SANCTIONS
BY DEFENDANT TRAVIS COUNTY.
APRIL 3, 1990.

Exhibit N - ORDER DENYING PLAINTIFF'S
REQUEST FOR MOTION FOR
DISCOVERY CONFERENCE
ACCORDING TO RULE 26(f).
APRIL 3, 1990.

Exhibit O - ORDER GRANTING PLAINTIFF'S
MOTION TO SUPPLEMENT
ORIGINAL PRE-TRIAL ORDER
INCLUDING LIST OF DOCUMENTS

FILED WITH AFFIDAVIT

ATTACHED TO AMENDED

LAWSUIT.

APRIL 3, 1990.

Exhibit P: ORDER DENYING DESIGNATION

OF ATTORNEY OF RECORD FOR

TRAVIS COUNTY.

APRIL 3, 1990.

Exhibit Q: ORDER THAT DEFENDANTS

TRAVIS COUNTY AND HYLON

ADAMS SHOW CAUSE ON OR

BEFORE MAY 1, 1990 WHY

MOTION OF PLAINTIFF FOR

FAILURE TO ANSWER

INTERROGATORIES AND FOR

PRODUCTION OF DOCUMENTS

SHOULD NOT BE GRANTED.

APRIL 3, 1990.

Exhibit R: DENIAL OF PLAINTIFF'S MOTION FOR PROTECTIVE ORDER. ALSO PLAINTIFF ORDERED TO APPEAR FOR DEPOSITION AT TRAVIS COUNTY BEFORE MAY 1, 1990.

APRIL 3, 1990.

Exhibit S: ORDER ACCEPTING JOINING OF ALL PARTIES.

MARCH 27, 1990.

Exhibit T: ORDER DENYING DEFAULT BECAUSE OF TARDINESS OF REPLY OF TRAVIS COUNTY AND HYLON ADAMS. THIRD REFUSAL.

MARCH 8, 1989.

Exhibit U: ORDER TO ALL ATTORNEYS TO SUBMIT NOTICE OF SCHEDULING ORDER.

MARCH 6, 1989.

Exhibit V: ORDER DENYING SECOND REQUEST FOR DEFAULT.

MARCH 3, 1989.

Exhibit W: ORDER DENYING CLERK'S DEFAULT JUDGMENT BECAUSE OF STRONG PREFERENCE FOR RECEIVING DISPUTES ON THE MERITS AND NOT ON DEFAULT JUDGEMENT.

FEBRUARY 1, 1989.

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

AUSTIN DIVISION

IRENE SIMON *

VS. *

* CIVIL NO. A-88-CA-728

NORBERT L. SIMON*
ET. AL.

JUDGMENT

This action came on for consideration before the Court, and the issues having been duly considered;

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Defendant Whisenhunt's Motion to Dismiss is GRANTED.

IT IS FURTHER ORDERED that Plaintiff's Motion to Remove Magistrate Capelle is DENIED as frivolous.

IT IS FURTHER ORDERED that Plaintiff's Complaint as to the remaining Defendants, Simon, Travis County, Hylon Adams, and John Dickson

is DISMISSED as frivolous. The requests for attorneys' fees, however, are DENIED.

Judgment is hereby ENTERED for all Defendants.

SIGNED AND ENTERED this 29th day of June, 1990.

JAMES R. NOWLIN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

AUSTIN DIVISION

IRENE SIMON *

VS. * CIVIL #A-98-CA-728

NORBERT L. SIMON, *
ET. AL.

ORDER

Before the Court are the following motions:

1. Defendant Whisenhunt's Motions for Summary Judgment and to Dismiss;

2. Defendant Simon's Motion for Summary Judgment;

3. Defendant Travis County's Motion to Dismiss; and

4. Defendant, Hylon Adams' Motion for Summary Judgment and Motion to Dismiss.

The above motions were referred to the United States Magistrate for findings and recommendations pursuant to 28 U.S.C. § 636 (b) and Rule 1(d) of Appendix C of the Local Rules of the United States District Court for the

Western District of Texas, as amended, effective March 1, 1982. Also, before the Court is Plaintiff Simon's Motion to Remove Magistrate Capello. Plaintiff filed what the court construes to be the following objections to the Magistrate's Reports and Recommendations:

1. Plaintiff''s Motion in Opposition to Interim Report and Recommendations of the U.S. Magistrate;

2. Plaintiff's Motion in Opposition of Dismissal of All Parties;

3. Plaintiff's Motion to Request Findings of the Court;

4. Plaintiff's Motion to Set Aside Judgments;

5. Plaintiff's Response to Report and Recommendation of U.S. Magistrate.

In light of the Plaintiff's objections to the Magistrate's Report and Recommendation, the Court has undertaken a de novo review of the entire file in this cause. The Court is

of the opinion and finds that the Recommendation filed by the Magistrate in this cause is correct and should in all things be approved and adopted by the Court.

It is THEREFORE ORDERED that each of United States Magistrate's Report and Recommendations filed in this cause are hereby approved and adopted as modified by the Court.

IT IS FURTHER ORDERED that Defendant Whisenhunt's Motion to Dismiss is granted.

IT IS FURTHER ORDERED that Plaintiff's Motion to Remove Magistrate Capello is DENIED as frivolous.

IT IS FURTHER ORDERED that Plaintiff's Complaint as to the remaining Defendants, Simon, Travis County, Hylon Adams, and John Dickson is DISMISSED as frivolous. The requests for fees, however, are DENIED.

SIGNED AND ENTERED this 29th day of June, 1990.

JAMES R. NOWLIN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

AUSTIN DIVISION

IRENE SIMON	*	
	*	
VS.	*	CIVIL NO. A-88-CA-728
*		
NORBERT SIMON	*	
ET. AL.	*	

ORDER

REPORT AND RECOMMENDATION
OF THE UNITED STATES MAGISTRATE

TO: THE HONORABLE JAMES R. NOWLIN
UNITED STATES DISTRICT JUDGE

The undersigned submits this Report and Recommendation to the Court pursuant to 28 U.S.C. #636 (b) and Rule 1(c) of Appendix C of the Local Court Rules of the United States District Court for the Western District of Texas, Local Rules for the Assignment of Duties to United States Magistrates, as amended, effective March 1, 1982.

I. PENDING DISPOSITIVE MOTIONS

Before the Court are the following pending dispositive motions, for which

a Report and Recommendation (R&R) has been filed:

1. Defendant Wisenhunt's 5/17/89 Rule 56 and Rule 12 Motions -- R&R filed 4/13/90.

2. Defendant Simon's 4/24/90 Motion for Summary Judgment -- R&R filed 5/21/90.

3. Defendant Travis County's 5/3/90 Motion to Dismiss -- R&R below.

4. Defendant Hylon Adams' 5/25/90 Motion for Summary Judgment and Motion to Dismiss -- R&R below.

Before the Court are the following pending Rule 72 appeals to the U.S. District Court of prior Magistrate rulings:

1. Plaintiff Simon's 4/24/90 Motion to Remove Magistrate Capelle.

2. Plaintiff Simon's 4/24/90 Objection to Magistrate's Extension of Time for Defendants.

The following objections to Magistrate's prior Report and Recommendations are pending:

1. Plaintiff's 4/20/90 Motion in Opposition to Interim R&R of the U.S. Magistrate.

2. Plaintiff's 5/30/90 Motion in Opposition of Dismissal of all Parties.

3. Plaintiff's 6/5/90 Motion to Request Findings of the Court, and

4. Plaintiff's 6/5/90 Motion to Set Aside Judgments.

As of this date, Defendant John Dickson has not filed dispositive motions for the Court's review.

II. TRAVIS COUNTRY'S MAY 3, 1990 MOTION TO DISMISS

Before the Court is Travis County's May 3, 1990 Motion to Dismiss. No response was filed.

A. Procedural History & Plaintiff's Complaint See Magistrate's R&R filed April 13, 1990.

B. Travis County's Allegations

In its Motion to Dismiss, the County alleges that the plaintiff's complaint should be dismissed for six

reasons:

1. Failure to state a claim under #1983.

2. Failure to state a claim under #1985.

3. Failure to state a claim under the Fourth Amendment.

4. Failure to state a claim under the Sixth Amendment.

5. Failure to state a claim under the Seventh Amendment.

6. Failure to state a claim under the Fourteenth Amendment.

C. Plaintiff's Response

The plaintiff has failed to respond to the defendants' Motion in a timely manner as required by the Local Rule of the Western District of Texas No. 300-5(f).

D. Analysis

Well established in federal law is the common law principle that federal courts lack jurisdiction over domestic or family law claims. Any procedural errors that may have occurred during a domestic divorce adjudicated in state

Court may be addressed only in state court system. The federal courts, under the abstention doctrine, are required to refrain from adjudicating such issues. As long ago as 1972, in Harris v. Samuels, 440 F.2d 748, 752 (5th Cir.), cert. denied, 404 U.S. 832, 92 S.Ct. 77, 30 L.Ed.2d 62 (1971), the fifth Circuit held: "...a federal court should be slow to intervene, but should instead avoid needless conflict with the administration by the State of its own affairs." See also Younger v. Harris, 401, U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971).

The first inquiry in any #1983 complaint is whether the Plaintiff has been deprived of a right secured by the United States Constitution. Baker v. McCollan, 443 U.S. 137, 99 S.Ct. 2689 (1979). If the plaintiff has been deprived of a civil right, such deprivation must occur under color of

state law and as a result of some established state procedure. Parratt v. Taylor, 451 U.S. 527, 101 S.Ct. 1908, 1917 (1981). Further, in Elliott v. Perez, 751 F.2d 1472, 1480 (5th Cir. 1985), the Fifth Circuit Court of Appeals stated that conclusory allegations, unsupported by allegations of specific facts, are insufficient to support constitutional claims.

The plaintiff's complaint that she was forced into a divorce does not rise to the level of a constitutional violation. Furthermore, the plaintiff has provided the Court with a copy of her divorce decree, to which she consented in writing and form, which she did not appeal.

The plaintiff's allegations that Defendant Travis County conspired under color of law to deprive the plaintiff of her Fourth, Seventh and Fourteenth Amendment rights under the U.S.

Constitution is unsupported by facts sufficient to overcome the standard set out in Elliott v. Perez, supra. Additionally, the plaintiff fails to support her 42 U.S.C. ##1983 and 1985 claims.

As stated in prior Reports and Recommendations, the plaintiff's sole remedy to her dissatisfaction with her divorce is to file a Motion for New Trial with the State District Court under Rule 329B of the Texas Rules of Civil Procedure. If that Motion is denied, she may then appeal her case to the appellate courts of texas under Texas Rules of Civil Procedure 296 and 299, as well as under the Texas Rules of Appellate Procedure.

The purpose of a motion to dismiss a complaint for failure to state a claim for which relieve can be granted under F.R.Civ.P. 12(b) (6) is to test the

formal sufficiency of the plaintiff's claims for relief. Even if plaintiff's complaint is viewed in the light most favorable to the plaintiff and with every doubt resolved in her behalf, the complaint in this case, nevertheless, should be dismissed. A dismissal is justified because the allegations contained in the plaintiff's complaint clearly demonstrate that the plaintiff does not have a cognizable claim under the facts and legal theories she has alleged.

Further, the plaintiff's complaint was filed outside the statute of limitations. The plaintiff complains of action taken during a period to time ending in February, 1986. The plaintiff's suit was not filed until September 2, 1988. The statute of limitations is controlled by Texas law. Drayton v. Needville ISD, 642 F.2d 129

(5th Cir. 1981). Section 16.003(a) of the Texas Civil Practice and Remedies Code provides a two (2) year statute of limitations for general tort liability. Thus the plaintiff's suit is not timely and should be dismissed.

The Court need not address the plaintiff's First Amended Original Petition, because it was filed on May 10, 1989, ten (10) days after the Court's April 30, 1989 deadline to file amended pleadings, as set out in the Court's Order of March 27, 1989.

Defendant Hylon Adams filed a Motion to Dismiss and a Motion for Summary Judgment on May 25, 1990. No response was timely filed under the Local Rules. The Court has considered the Motions and finds that the defendants' motions have merit and should be granted for the reasons set out above.

Defendant Adams raises the same or substantially similar allegations as Defendant Travis County, Defendant Simon and Defendant Wisenhunt. For the reasons set out above and in the Report and Recommendations filed on April 24, 1990 and May 21, 1990, the Court RECOMMENDS that Defendant Adams' Motion to dismiss be GRANTED.

IV. FEDERAL RULE OF CIVIL PROCEDURE NO. 11

No plaintiff has a "license to harass others, clog the judicial machinery with meritless litigations, and abuse already overloaded court dockets." Ferguson v. MBank Houston, N.A., 808 F.2d 358, 359 (5th Cir. 1986). The positions taken by the plaintiff in this case have no basis in existing law or any reasonably based suggestion for the extension, modification or reversal of existing law. The claims are

patently meritless. See Itz v. U.S. Tax Court and I.R.S., No. A-85-CA-633, U.S. District Court, Western District of Texas, Austin Division, May 6, 1987 (published in 1987 Prentice Hall, Inc.--Federal Taxes, Paragraph 87-5030). See also Harris v. U.S. Department of Justice, 680 F.2d 1109 (5th Cir. 1982).

Rule 11 of the Federal Rules of Civil Procedure states:

> The signature of an attorney or party constitutes a certificate by the signer that the singer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass, or to cause unnecessary delay or needless increase in the costs of litigation...If a pleadings, motion, or other paper is signed in violation of this rule, the Court upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of

the filing of the pleadings, motion, or other paper, including a reasonable attorney's fee.

Rule 11 imposes three separate affirmative duties on the signer of a paper filed with the Court. The signing attorney certifies:

> (1) that [he] has conducted a reasonable inquiry into the facts which support the document;
>
> (2) that [he] had conducted a reasonable inquiry into the law such that the document embodies existing legal principles or a good faith argument "for the extension, modification, or reversal of existing law; and
>
> (3) that the motion is not interposed for purposes of delay, harassment, or increasing costs of litigation.

Thomas v. Capital Security Services, Inc., 836 F.2d 866, 874 (5th Cir. 1988) (en banc). A violation of any of these duties constitutes a violation of Rule 121. Truck Treads, Inc. v. Armstrong Rubber Co., 868 F.2d 1472 (5th Cir. 1989). The Court finds that the

plaintiff's complaint was not well grounded in law and that she should be sanctioned according to Rule 11 by the award of attorney's fees to the defendants.

V. RECOMMENDATION

In light of the above analysis, the undersigned RECOMMENDS that the Court GRANT Defendant Travis County's Motion to Dismiss and GRANT Hylon Adams' Motion to dismiss. The undersigned ALSO RECOMMENDS that the Court adopt in full the two Reports and Recommendations filed April 13, 1990, and May 21, 1990.

The plaintiff's complaint against Defendant John Dickson remains pending; however, the undersigned RECOMMENDS that the plaintiff's complaint as to all parties, including John Dickson, be DISMISSED in its entirety.

Finally, the undersigned RECOMMENDS that the Court enter an AWARD of

reasonable attorney's fees to the defendants as Rule 11 Sanctions against the plaintiff for bringing a frivolous complaint.

The plaintiff may file objections to this recommendation. Failure to file written objections to the findings and recommendations contained in this report within ten (10) days from the date of the Report and Recommendation is filed shall bar an aggrieved party from receiving a de novo review by the district court of the findings and recommendations in this report, see 28 U.S.C. #636(b)(1)(C), and shall bar an aggrieved party from attacking the findings and recommendations contained in this report on appeal. see Nettles v. Wainwright, 677 F.2d 404, 408-410 (5th Cir. 1982) (Unit B en banc). See also Thomas v. Arn, 474 U.S. 140, 106 S.Ct. 466, 88 L.Ed.2d 435, 445 (1985)

(rehearing denied) (bar of attack on appeal held constitutional and not in violation of Federal Magistrates Act).

The clerk is directed to mail a copy of this recommendation to the movant, return receipt requested, to all parties.

SIGNED AND ENTERED this 12th (?) day of June, 1990, at Austin, Texas.

STEPHEN H. CAPELLE
UNITED STATES
MAGISTRATE

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

AUSTIN DIVISION

IRENE SIMON	*	
	*	
VS.	*	CIVIL NO. A-88-CA-728
	*	
NORBERT SIMON, ET. AL.	*	

ORDER

INTERIM REPORT AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE

TO: THE HONORABLE JAMES R. NOWLIN
UNITED STATES DISTRICT JUDGE

The undersigned submits this Report and Recommendation to the Court pursuant to 28 U.S.C. #636(b) and Rule 1(c) of Appendix C of the Local Court Rules of the United States District Court for the Western District of Texas, Local Rules for the Assignment of Duties to United States Magistrates, as amended, effective March 1, 1982.

Before the Court is Defendant Norbert L. Simon's Motion for Summary

Judgment and to Dismiss with Memorandum of Law in Support. No response was filed.

I. STANDARD OF REVIEW

The Court may only grant summary judgment under Federal Rules of Civil Procedure 56(c) if the record reveals no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Celotex Corp. v. Catrett, 106 S.Ct. 2548, 2552-53 (1986). In deciding whether to grant summary judgment, the Court should view the evidence in the light most favorable to the party opposing summary judgment and indulge all reasonable inferences in favor of that party. Pharo v. Smith, 621 F.2d 656, 664 (5th Cir. 1980).

A Motion for Summary Judgment cannot be granted simply because there is no opposition, even if the failure to oppose violated a local rule.

John v. La. (Bd. of Trustees for State Colleges and Universities), 757 F.2d 698, 709 (5th Cir. 1985). The movant has the burden of establishing the absence of a genuine issue of material fact. Unless he has done so, the Court may not grant the motion, regardless of whether any response was filed. Therefore, a district judge's decision to grant summary judgment may not be solely because of default.' Hibernia National Bank v. Administracion Central Sociedad Anonima, 776 F.2d 1277 (5th Cir. 1985).

Summary judgment motions must be granted on the merits. Pursuant to F.R.Civ.P. 56(c), plaintiffs are entitled to summary judgment if (1) the pleadings and summary judgment show that there is no genuine issue of any material fact, and (2) the movant is entitled to prevail as a matter of law.

Celotex v. Catrett, 106 S. Ct. 2552-53 (1986).

This is stated in Rule 56(e) Fed. R.Civ.P. as follows:

When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

II. Findings of Fact

1. The Court finds that the plaintiff's complaint concerns a period of time beginning in August, 1984, and ending in February, 1986. (Plaintiff's May 8, 1989 Affidavit).

2. The Court finds that the plaintiff's complaint against Defendant Simon is untimely because it pleads matters barred by the Texas Statute of Limitations.

constitutional rights have been violated by her divorce from Defendant Simon do not rise to the level of a constitutional violation.

In Baker v. McCollan, 443 U.S. 137, 99 S.Ct. 2689, 61 L.Ed.2d 443 (1979), it as noted that the first inquiry in any #1983 suit is whether the plaintiff has been deprived of a right secured by the constitution.

The plaintiff does not support her conclusory allegations with facts sufficient to support any possible claim. Her conclusory allegations do not present any cognizable statutory or constitutional claim. The Fifth Circuit in Elliott v. Perez, 751 F.2d 1472, 1480 (5th Cir. 1985), stated: "...this court has consistently held that conclusory allegations unsupported by allegations of specific facts are insufficient to support constitutional claims."

5. Plaintiff's remedy lies in state court. She could file a Motion for a New Trial or appeal her case to the appellate courts of Texas.

6. Under the abention doctrine, the U.S. District Court is prohibited from redressing alleged procedural errors in Texas State Court Civil Judgments.

7. Even if the plaintiff's complaint is viewed in the light most favorable to the plaintiff and with every doubt resolved in her favor, the plaintiff's complaint fails to state a cause of action in this Court.

8. The Statue of Limitations for a Civil Rights complaint in Texas is two years. Drayton v. Needville ISD, 642 F.2d 129 (5th Cir. 1981); Section 16.003(a), Texas Civil Practice & Remedies Code. Because the actions of which the plaintiff complains ended in February, 1986, and because this suit

was not filed until August, 1988, the plaintiff's suit is not timely filed and may be dismissed as outside the Statute of Limitations.

IV. RECOMMENDATION

In light of the above, the undersigned RECOMMENDS that Defendant's Motion to Dismiss for failure to state a claim under F.R.Civ.P. Rule 12 (B) (6) be GRANTED. In the alternative, the undersigned RECOMMENDS that Defendant Simon's Motion for Summary Judgment be GRANTED, as there are no genuine issues of material fact and the defendant is entitled to a judgment in his favor as a matter of law.

The plaintiff may file objections to this recommendation. Failure to file written objections to the findings and recommendations contained in this report within ten (10) days from the date of

its receipt shall bar an aggrieved party from receiving a de novo review by the district court of the findings and recommendations in this report, see 28 U.S.C. #636 (b) (C), and shall bar an aggrieved party from attacking the findings and recommendations contained in this report on appeal, see Nettles v. Wainwright, 677 F.2d 404, 408-410 (5th Cir. 1982) (Unit B en banc). See also Thomas v. Arn, 474 U.S. 140, 106 S.Ct. 466, 88 L.Ed.2d 435, 445 (1985) (rehearing denied) (bar of attack on appeal held constitutional and not in violation of Federal Magistrates Act).

The clerk is directed to mail a copy of this recommendation to the movant, return receipt requested, to all parties.

SIGNED AND ENTERED this 21st day of May, 1990, at Austin, Texas.

STEPHEN H. CAPELLE
UNITED STATES
MAGISTRATE

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

AUSTIN DIVISION

IRENE SIMON	*	
	*	
VS.	*	CIVIL NO. A-88-CA-728
	*	
NORBERT SIMON, ET. AL.	*	

ORDER

Before the Court is the plaintiff's June 26, 1989 Motion for Sanctions. Also before the Court is the defendant Travis County's April 13, 1990 Response, the plaintiff's April 16, 1990 Motion to Supplement the Motion for Sanctions, and the plaintiff's April 20, 1990 Response (Reply) to Defendant Travis County, Response.

The Court has considered the plaintiff's April 16, 1990 Motion to Supplement the Motion to Sanction Defendant Travis County, et. al. No response was filed. The Court finds

that the plaintiff should be allowed to file her supplement to her Motion to Sanction.

It is therefore the ORDER of the Court that the plaintiff's Motion to Supplement be GRANTED. This Order does not, however, grant the underlying motion.

The Court has considered the plaintiff's underlying Motion for Sanctions, the defendant's response and the plaintiff's reply, and the Court finds that the plaintiff's motion lacks merit and should be denied.

It is therefore the ORDER of the Court that the Plaintiff's June 26, 1989 Motion for Sanctions is hereby in all things DENIED.

SIGNED AND ENTERED this 18th day of May, 1990, at Austin, Texas.

STEPHEN H. CAPELLE
UNITED STATES
MAGISTRATE

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

AUSTIN DIVISION

IRENE SIMON	*	
	*	
VS.	*	CAUSE NO. A-88-CA-728
	*	
NORBERT SIMON ET. AL.	*	

ORDER

INTERIM REPORT AND RECOMMENDATION
OF THE UNITED STATES MAGISTRATE

TO: THE HONORABLE JAMES R. NOWLIN
UNITED STATES DISTRICT JUDGE

The undersigned submits this Report and Recommendation to the Court pursuant to 28 U.S.C. #636(b) and Rule 1(c) of Appendix C of the Local Court Rules of the United States District Court for the Western District of Texas, Local Rules for the Assignment of Duties to United States Magistrates, as amended, effective March 1, 1982.

Before the Court is the pro se plaintiff's civil rights complaint filed pursuant to 42 U.S.C. #1983. Also before the Court is Defendant Carolyn Whisenhunt's May 17, 1989 Motions for Summary Judgment and to Dismiss.

The undersigned has considered the defendant's Motions for Summary Judgment and to Dismiss and the plaintiff's May 19, 1989 responses. The undersigned RECOMMENDS that the defendant's Motion for Summary Judgment and to Dismiss be GRANTED for the following reasons.

I. PROCEDURAL HISTORY

The plaintiff filed her original complaint on September 2, 1988, after which various defendants filed answers. On May 10, 1989, the plaintiff filed her First Amendment without leave of court. The plaintiff's first Amendment to

Original Petition added Carolyn Whisenhunt as a party. Soon after, Defendant Whisenhunt filed her Motions for Summary Judgment and to Dismiss.

II. PLAINTIFF'S COMPLAINT

The plaintiff's complaint raises a number of issues surrounding her divorce from Defendant Norbert L. Simon which took place in Travis County, Texas, on or about February, 1986. The plaintiff is dissatisfied on many levels with the result of the proceedings and with the actions of numerous people involved in the proceedings. For example, in addition to suing her ex-husband, the plaintiff sues her former attorney, Hylon L. Adams, various Travis County employees, and her ex-husband's attorney during the divorce proceedings, Defendant Carolyn Whisenhunt. Although

the plaintiff is sorely grieved by the result of the divorce proceedings and by the behavior of various persons involved in the divorce proceedings, she has not stated a claim cognizable under 42 U.S.C. #1983. In other words, the plaintiff has failed to allege that she was deprived of a right secured by the United States Constitution.

III. DEFENDANT CAROLYN WHISENHUNT'S MOTION FOR SUMMARY JUDGMENT AND MOTION TO DISMISS

A. Summary

Defendant Whisenhunt states that there is no genuine issue as to any material fact in the case. Defendant Whisenhunt argues that the plaintiff's complaint is untimely because it is barred by the Texas Statute of Limitations and because it was filed after the expiration of the Court's

scheduling order deadline for amending pleadings, which was established by the Court as March 16, 1989. Defendant Whisenhunt states that she is entitled to recovery of attorney's fees necessarily expended in responding to the plaintiff's frivolous petition.

In Defendant Whisenhunt's Motion to Dismiss, the defendant claims that the Court lacks jurisdiction over the subject matter of the plaintiff's complaint. The defendant claims that the plaintiff's complaint is not cognizable in federal court and that the plaintiff has failed to state a claim upon which relief can be granted. The defendant admits that the plaintiff has filed a "litany of complaints;" however, the defendant claims that the plaintiff does not meet the requirements of 42

U.S.C. #1983. The defendant alleges that the plaintiff's suit is frivolous and wholly without merit and that the defendant is entitled to judgment on the pleadings. The defendant makes a Rule 11 request for attorney's fees and court costs.

B. Grounds for Dismissal

In the defendant's Memorandum of Law in Support of Rule 12 Motions and Summary Judgment Motion, Defendant Carolyn Whisenhunt alleges four grounds for dismissing the plaintiff's complaint.

First, the defendant claims that because federal courts are not divorce courts, the plaintiff's complaint is not judicially cognizable in federal court. The defendant claims that the plaintiff's remedy lies in an appeal of

her divorce in the state court system.

Second, the defendant claims that the plaintiff has pled no cause of action against the defendant. Assuming that every one of the plaintiff's allegations were true, assuming that no statute of limitations bar existed, and assuming that the plaintiff has properly amended her complaint with leave of court, the defendant claims that the plaintiff has failed to demonstrate the Defendant Carolyn Whisenhunt has denied the plaintiff due process or equal protection. The defendant claims that she was neither an instrumentality of the state, nor does she owe a duty to protect the rights of the plaintiff.

Third, the defendant claims that the plaintiff's complaint is barred by the Statute of Limitations, which, for a

civil rights complaint in Texas, is two (2) years. The defendant claims that the alleged cause of action arose in February, 1986, and that the lawsuit was not filed until September, 1988.

Finally, the defendant alleges that the complaint against Carolyn Whisenhunt was filed in violation of the Court's Scheduling Order and Federal Rules of Civil Procedure 15(a). The defendant asks the Court to strike the plaintiff's First Amended Complaint on these grounds.

IV. PLAINTIFF'S RESPONSE

A. Summary

In response to the defendant's Motion for Summary Judgment, the plaintiff alleges that she has filed a list of exhibits and affidavits, that she has tried to give the Court as much

information as possible to show the Court how the defendants violated her civil rights, and that she was the only "counsel" who followed the Court's Order to submit a Proposed Agreed Scheduling Order.

The plaintiff responded to the defendant's Rule 12 Motions, claiming that the court has jurisdiction over her case because it involves a "federal question." The plaintiff does not elaborate.

Second, the plaintiff alleges that she does indeed state a claim upon which relief may be granted because she demands a jury trial and monetary damages. The plaintiff alleges that her suit is not frivolous because it involves civil rights violations. Clearly the plaintiff engages in

circular reasoning and states merely conclusory allegations unsupported by specific facts.

The Court notes that the plaintiff objects to the Magistrate's hearing of this matter, as set out in her memorandum.

B.

The plaintiff has filed a Answer to Memorandum of Law in Support of Rule 12 Motions and Summary Judgment Motion of Defendant Whisenhunt. The plaintiff alleges sixteen (16) different reasons why her case should not be dismissed; however, some of the reasons elaborated by the plaintiff support the defendant's Motion to Dismiss and for Summary Judgment.

First, the plaintiff states that she has arranged to have the state

district court judge review her divorce under a Bill of Review because she alleges fraud in her divorce. Second, the plaintiff states that her action concerns the violation of her civil rights. However, the plaintiff does not elaborate.

Third, the plaintiff complains that Defendant Whisenhunt's attorney, Mark Levbarg, has tried to instruct the Court as to its responsibilities. The plaintiff then lodges an ad hominum attack against the defendant's attorney. Fourth, the plaintiff alleges that her action against Defendant Whisenhunt should not be dismissed because, as a pro se litigant, her failure to obtain leave of court or her failure to comply with the Court's Scheduling Order, and her failure to file her complaint within

the Statute of Limitations all should be overlooked by the Court.

Fifth, the plaintiff states, "Carolyn Whisenhunt is bound by certain ethical procedures which she was required to follow to make this divorce legal." The Court notes at this time that ethical complaints against attorneys are best addressed through the State Bar Grievance Committee.

Sixth, the plaintiff complains of ex parte hearings at the state court level, which precluded her from trying her divorce by jury trial. She states that, "The Family Codes of Texas definitely say that 'either party can demand a jury trial.'" Seventh, the plaintiff states that Defendant Whisenhunt's Motion to force the plaintiff to retain counsel (Defendant

Adams) was also illegal. Eighth, the plaintiff alleges that Judge Jones refused to read the evidence submitted to him. She alleges that this refusal to consider evidence deprived the plaintiff of her due process right to a "meaningful hearing."

Ninth, the plaintiff alleges that Defendant Whisenhunt "never had the right to oppose plaintiff's demand for a jury trial." Tenth, the plaintiff states that she can prove that many notices were sent to her under the improper cause number, "which made the whole action null and void." She states that this null and void action "renders her divorce completely illegal."

Plaintiff's paragraph no. 12 is indiscernible.

Thirteenth, the plaintiff states that she intends to research the laws pertaining to false imprisonment, stating that she believes all 54,800,000 of the Roman Catholics in the United States would be "overjoyed to realize that no state court has jurisdiction over their lives which take precedent over the practice of their religion and the sanctity of their marriages." The remainder of the plaintiff's thirteenth paragraph is unintelligible. Fourteenth, the plaintiff provides the Court with the law dictionary definition of the word "waiver." Fifteenth, the plaintiff states that federal judges can set aside or overturn state courts to preserve constitutional rights. Sixteenth, the plaintiff states that the

defendant's use of "Hammigood Cause No. 339,502 was grounds for dismissal of the whole action because of fraud being practiced upon the [state] district court." The plaintiff states that Defendant Whisenhunt was joined in the lawsuit because she "was not given the right to disregard the rules of the State of Texas Family Code, she was not given the right to disregard the [plaintiff's] right to a jury trial as found in the Seventh Amendment rights that the plaintiff was entitled to." The plaintiff also alleges that she called the Washington Civil Rights Division, which told her that she had up to five (5) years after the violation had occurred to sue in federal court for the violation of her civil rights.

Seventeenth, the plaintiff admits that she was seven days late in amending her complaint. She asks that the Court amend the Scheduling Order and deem her amended complaint timely filed. She states to the Court that she is not an attorney, but merely a secretary and housewife. Eighteenth, the plaintiff states that if Defendant Whisenhunt did nothing wrong, she would have nothing to fear from a jury trial. Nineteenth, the plaintiff requests that the Court order Defendant Whisenhunt to refrain from attacking the plaintiff regarding her religion, her personal values and her failed marriage. The plaintiff states that she never would have gotten married if she had known there was such a thing as no-fault divorce.

In paragraph 20, the plaintiff complains that Defendant Whisenhunt does not argue against the plaintiff's civil rights complaint, but has merely argued and sought summary judgment on the "null and void divorce action." The plaintiff complains that although Defendant Whisenhunt was paid to free the plaintiff's ex-husband (Defendant Norbert L. Simon) from the plaintiff (Mrs. Simon), Defendant Whisenhunt trampled the plaintiff's civil rights in representing Mr. Simon. The plaintiff does not elaborate.

In plaintiff's paragraph 21, the plaintiff states that she does not agree to any substitutions of judges. The plaintiff wishes Judge Nowlin to hear her complaint and does not agree that

Magistrate Capello, or anyone else, should hear any portion of the lawsuit. The plaintiff incorrectly interprets the Federal Rules of Civil Procedure to understand that her complaint will not be heard by the Magistrate unless she agrees to his jurisdiction.

While it is true that parties can consent to proceed before the Magistrate under 28 U.S.C. #636(c), it is also true that the Honorable James R. Nowlin can refer all portions of the plaintiff's suit to the Magistrate for report and recommendation under 28 U.S.C. #636(b)(1)(B) and (C). After the undersigned files his report and recommendation in the above styled and numbered cause, the plaintiff has ten (10) days in which to file her objections. The U.S. District

Judge, James R. Nowlin's referral of the matter to the Magistrate is not subject to challenge.

In paragraph 22, the plaintiff assumes that the federal court has permitted the plaintiff to pursue her civil rights suit against all parties mentioned on the court docket because the federal court intake sheet states that the jurisdiction of the plaintiff's suit is found under the doctrine of "federal question." The plaintiff also alleges that the docket sheet is assigned to James R. Nowlin and, therefore, the plaintiff's suit cannot be referred to the Magistrate. The plaintiff's contentions are spurious. The intake docket sheet does not determine whether or not the Court has

jurisdiction. Jurisdiction is a legal issue to be decided by the Court.

In paragraph 23, the plaintiff threatens to "file a writ of mandamus in New Orleans and go towards the Supreme Court of the United States." She states she will do these things if the case is removed from Judge James Nowlin's docket and if the Court refuses to grant her a jury trial. She states that "there is no reason to try to go around Judge Nowlin except to gain some illegal advantage on the part of the defendants which plaintiff will not tolerate."

In paragraph 24, the plaintiff "takes issue with the idea that there will be three or four judges or magistrates to rule on different motions, as was the case in her divorce

in Travis County District Court. She states that it was this situation that caused no judge to know enough about the case to control it and know exactly what was going on. An injustice was the result. Plaintiff is determined that this will not happen again."

Finally, in paragraph 26, the plaintiff alleges that "attorney for Carolyn Whisenhunt has undertaken to act as the champion for every defendant in trying to obtain money from plaintiff." The Court interprets this sentence to refer to Attorney Levbarg's request for attorney's fees and costs of court in responding to the plaintiff's frivolous motion. The remainder of the plaintiff's paragraph 26 appears wholly irrelevant to the issue now before the Court.

V. ANALYSIS

The first inquiry in a civil rights claim is whether the plaintiff has been deprived of a right secured by the United States Constitution. Baker v. McCollan, 443 U.S. 137, 99 S.Ct., 2689, 61 L.Ed.2d 443 (1979). The deprivation must occur (1) under color of law and (2) as a result of some established procedure. Parratt v. Taylor, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981). further, in Elliott v. Perez, 751 F.2d 1472, 1480 (5th Cir. 1985), the Fifth Circuit Court of Appeals stated that conclusory allegations, unsupported by allegations of specific facts, are insufficient to support constitutional claims.

Any irregularities in procedure in the plaintiff's state court divorce case must be addressed by the state court system. The federal courts, under the abstention doctrine, are required to refrain from adjudicating such issues. As long ago as 1971, in Harris v. Samuels, 440 F.1d 748, 752 (5th Cir.), cert. denied, 401, U.S. 832, 92 S.Ct. 77, 30 L.Ed.2d 62 (1972), the Fifth Circuit held: "...a federal court should be slow to intervene, but should instead avoid needless conflict with the administration by the State of its own affairs." See also Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746, 27 LEd.2d 669 (1971).

VI. RECOMMENDATION

In light of the above, the undersigned RECOMMENDS that the plaintiff's complaint against Defendant Carolyn Whisenhunt be DISMISSED. Further, the undersigned RECOMMENDS that the Defendant Whisenhunt's requests for attorney's fees and costs of court be DENIED.

The plaintiff's complaint against all other defendants remains pending until such time as these defendants move for summary judgment or dismissal pursuant to Rule 12 F.R.Civ.P. The Court notes that both Motions for Summary Judgments and Motions to Dismiss require a brief in support. These motions and briefs should be filed within a short period of time because Scheduling Order deadlines have passed.

_____The plaintiff may file objections to this recommendation. Failure to file written objections to the findings and recommendations contained in this report within ten (10) days from the date of its receipt shall bar an aggrieved party from receiving a de novo review by the district court of the findings and recommendations in this report, see 28 U.S.C. #636(b) (1) (C), and shall bar an aggrieved party fro0m attacking the findings and recommendations contained in this report on appeal, see Nettles v. Wainwright, 677 F.2d 404, 408-41-0 (5th Cir. 1982) (Unit B en banc). See also Thomas v. Arn, 474 U.S. 140, 106 S.Ct. 466, 88 L.Ed.2d 435, 445 (1985) (rehearing denied) (bar of attack on appeal held constitutional and not in violation of Federal Magistrates Act).

The clerk is directed to mail a copy of this recommendation to the plaintiff, return receipt requested, and to all other parties by regular mail.

SIGNED and ENTERED this 12th day of April, 1990, at Austin, Texas.

STEPHEN CAPELLE
Magistrate

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

AUSTIN DIVISION

IRENE SIMON	*	
	*	
VS.	*	CIVIL NO. A-88-CA-728
	*	
NORBERT SIMON, ET. AL.	*	
	*	

ORDER

Before the Court is the plaintiff's June 5, 1989 Motion for Sanctions under Rule 37. Also before the Court is Defendant Carolyn Whisenhunt's June 9, 1989 Reply. The Court has considered the plaintiff's motion, as well as the defendant's response. The defendant states that the defendant answered the plaintiff's discovery requests and that sanctions are inappropriate.

The Court finds that the plaintiff's Motion for Sanctions should be denied. It is therefore the ORDER of the Court that the plaintiff's June 5,

1989 Motion for Sanctions be and is hereby in all things DENIED.

SIGNED and ENTERED this 3rd day of April, 1990, at Austin, Texas.

STEPHEN H. CAPELLE
UNITED STATES
MAGISTRATE

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

AUSTIN DIVISION

IRENE SIMON	*	
	*	
VS.	*	CIVIL NO. A-88-CA-728
	*	
NORBERT SIMON, ET. AL.	*	

ORDER

IT IS FURTHER ORDERED that all pending and future dispositive motions are REFERRED to Magistrate Capello for Report and Recommendation pursuant to 28 U.S.C. #636(b) (1) (B), Federal Rule of Civil Procedure 53, and Rule 1(c) of Appendix C of the Local Rules of the United States District Court for the Western District of Texas, as amended, effective March 1, 1982.

SIGNED AND ENTERED this 3rd day of April, 1990.

JAMES R. NOWLIN
UNITED STATES DISTRICT
JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

AUSTIN DIVISION

IRENE SIMON * VS. NORBERT SIMON. * * CIVIL NO. A-88-CA-728 * ET. AL. *

ORDER

Before the Court is the plaintiff's "Motion for Pre-Trial Order" filed June 26, 1989. The plaintiff seeks to file a proposed pre-trial order. No response was filed.

The Court has considered the plaintiff's motion and finds that a motion is not required to file a proposed pre-trial order. The plaintiff's Pre-Trial Order was filed June 26, 1989.

It is therefore the ORDER of the Court that the plaintiff's Motion for Pre-Trial Order, filed June 26, 1989, be DENIED AS MOOT.

It is the FURTHER ORDER of the Court that the Plaintiff's motion shall remain marked June 26, 1989, and shall remain of record in this case.

SIGNED AND ENTERED this 3rd day of April, 1990, at Austin, Texas.

STEPHEN H. CAPELLE
UNITED STATES
MAGISTRATE

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

AUSTIN DIVISION

IRENE SIMON	*	
	*	
VS.	*	CIVIL NO. A-88-CA-728
	*	
NORBERT SIMON, ET. AL.	*	

ORDER

Before the Court is the defendant Travis County's Motion for Sanctions under Rule 37, filed May 30, 1989. Also, before the Court is the Plaintiff's June 2, 1989 Response.

The Court has considered the defendant's motion and the plaintiff's response. The Court finds that the defendant's motion has some merit and should be granted in part and denied in part. The Court does not find monetary sanctions against a pro se plaintiff appropriate at this time, but it will not hesitate to impose such sanctions at a later date if necessary. Likewise,

the Court does not find it appropriate to strike the pro se plaintiff's claims at this time. The Court will not hesitate to recommend such action at a future date, if necessary.

It is therefore the ORDER of the Court that the plaintiff be COMPELLED to give her deposition on or before May 1, 1990. It is the FURTHER ORDER of the court that all other relief sought by the defendant be and is hereby DENIED at this time.

The Court notes that Defendant Travis County, in its original answer, requested that the plaintiff's suit be dismissed. The Court further notes that no brief was filed. In accordance with Local Rule 300-5(c) it is the ADDITIONAL ORDER of the Court that all defendants file, on or before May 15, 1990, briefs in support of any requests that the plaintiff's suit be dismissed.

SIGNED AND ENTERED this 3rd day of April, 1990, at Austin, Texas.

STEPHEN H. CAPELLE
UNITED STATES
MAGISTRATE

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

AUSTIN DIVISION

IRENE SIMON *

VS. * CIVIL NO. A-88-CA-728

NORBERT SIMON *
ET. AL.

ORDER

Before the Court is the plaintiff's June 14, 1989 Motion for Discovery Conference According to Rule 26(f). No response was filed.

The Court has considered the plaintiff's motion and finds that it should be denied. The plaintiff has not demonstrated sufficient need for a discovery conference. The Court finds that it can rule on the plaintiff's motions without benefit of a court hearing.

It is therefore the ORDER of the Court that the plaintiff's Motion for

Discovery Conference, filed June 14, 1989, is hereby DENIED at this time.

SIGNED AND ENTERED this 3rd day of April, 1990, at Austin, Texas.

STEPHEN H. CAPELLE
UNITED STATES
MAGISTRATE

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

AUSTIN DIVISION

IRENE SIMON	*	
	*	
VS.	*	CIVIL NO. A-88-CA-728
	*	
NORBERT SIMON, ET. AL.	*	

ORDER

Before the Court is the plaintiff's Motion to Supplement Plaintiff's Original Pre-Trial Order, filed November 3, 1989. No response was filed.

The Court has considered the plaintiff's motion. Although much of the plaintiff's proposed supplement is not admissible as evidence at trial, the Court does not object to the plaintiff's filing the supplement.

It is therefore the ORDER of the court that the plaintiff's Motion to Supplement Plaintiff's Original Pre-Trial Order, filed November 3, 1989, be and is hereby GRANTED.

SIGNED AND ENTERED this 3rd day of April, 1990, at Austin, Texas.

STEPHEN H. CAPELLE
UNITED STATES
MAGISTRATE

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

AUSTIN DIVISION

IRENE SIMON	*	
	*	
VS.	*	CIVIL NO. A-88-CA-728
	*	
NORBERT SIMON, ET. AL.	*	

ORDER

Before the Court is the plaintiff's Motion for Defendant Travis County to Designate Attorney of Record, filed May 22, 1989. No response was filed.

The Court has considered the plaintiff's motion and finds that it should be denied. Travis County has designated the following attorney of record: James J. McCormack; however the County may designate several attorneys of record. Mr. McCormack may send another attorney as his representative to depositions and most court settings. That attorney should file an appearance with the Clerk of the Court prior to

representing Travis County.

The Court declines to limit Travis County's deposition of the plaintiff at this time. As the one who initiates a cause of action against another, the plaintiff is required to answer reasonable questions regarding herself and her past actions. Questions like "Where were you born?" are standard deposition questions, and the plaintiff should answer them.

It is thus the ORDER of the Court that the plaintiff's Motion for Travis County to Designate Attorney of Record is hereby DENIED.

SIGNED AND ENTERED this 3rd day of April, 1990, at Austin, Texas.

STEPHEN H. CAPELLE
UNITED STATES
MAGISTRATE

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

AUSTIN DIVISION

IRENE SIMON	*	
	*	
VS.	*	CIVIL NO. A-88-CA-728
	*	
NORBERT SIMON, ET. AL.	*	
	*	

ORDER

Before the Court is the plaintiff's Motion to Sanction Defendant Travis County, John Dickson and Hylon Adams Failure to Answer Interrogatories and Production of Documents According to Rule 37, filed by the plaintiff on June 26, 1989. No response has been filed.

It is therefore the ORDER of the Court that Defendants Travis County, John Dickson and Hylon Adams show cause, on or before May 1, 1990, why the Plaintiff's Motion should not be granted.

SIGNED AND ENTERED this 3rd day of April, 1990, at Austin, Texas.

STEPHEN H. CAPELLE
UNITED STATES
MAGISTRATE

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

AUSTIN DIVISION

IRENE SIMON	*	
	*	
VS.	*	CIVIL NO. A-88-CA-728
	*	
NORBERT SIMON, ET. AL.	*	

ORDER

Before the Court is the plaintiff's Motion for Protective Order Rule 37, filed May 25, 1989. No response was filed.

The Court has considered the plaintiff's Motion and finds that it lacks merit and should be denied. The plaintiff's received actual notice of the deposition scheduled for May 24, 1989. By her own admissions, she was not otherwise committed on that date.

The Court finds that the remainder of the plaintiff's requests lack merit

and should be denied. The County is not limited to one attorney; the defendants adequately noticed the plaintiff's deposition within the discovery deadline; the plaintiff has now had ample time to prepare for a deposition. The plaintiff should have known that her deposition would be taken because she filed the lawsuit.

The Court finds that the plaintiff's deposition should be compelled on or before the 1st of May, 1990.

It is therefore the ORDER of the Court that the plaintiff's Motion for Protective Order be and is hereby in all things DENIED.

It is the FURTHER ORDER of the Court that the Plaintiff's deposition be COMPELLED on or before May 1, 1990.

SIGNED AND ENTERED this 3rd day of April, 1990, at Austin, Texas.

STEPHEN CAPELLE
UNITED STATES MAGISTRATE

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

AUSTIN DIVISION

IRENE SIMON	*	
	*	
VS.	*	CIVIL NO. A-88-CA-728
	*	
NORBERT SIMON, ET. AL	*	
	*	

ORDER

IT IS HEREBY ORDERED that all pending and future discovery motions as well as other non-dispositive motions in this case, are REFERRED to the Honorable Stephen H. Capelle, United States Magistrate, for resolution pursuant to 28 U.S.C. # 636 (b) (1) (A), Federal Rule of Civil Procedure 53, and Rule 1(c) of Appendix C of the Local Rules of the United States District Court for the Western District of Texas, as amended, effective March 1, 1982.

SIGNED AND ENTERED this 29th day of March, 1990.

JAMES R. NOWLIN
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

AUSTIN DIVISION

IRENE SIMON	*	
	*	
VS.	*	CIVIL NO. A-88-CA-728
	*	
NORBERT SIMON, ET. AL.	*	

ORDER

Issue having been joined herein it is Ordered pursuant to Rule 16, F.R.Civ.P. and Local Rule 300-6, that:

1. Joining of other parties and the amending of the pleadings shall be on or before April 30, 1989 unless an extension is grnated on good cause shown.

2. Filing of all motions shall be on or before May 30, 1989 unless an extension is granted on good cause shown.

3. Discovery shall be completed by the parties on or before May 30, 1989

unless an extension is granted on good cause shown.

4. A conference of attorneys shall be held on or before May 30, 1989 unless an extension is granted on good cause shown.

5. That counsel for the parties submit their proposed agreed pre-trial order to the Court on or before June 15, 1989 unless an extension is granted on good cause shown. The proposed pre-trial order shall supply information required by Local Rule 300-6 and the pre-trial order check list (Form PT-1) which is in the Local Rules.

Ordered this 27th day of March, 1989.

JAMES R. NOWLIN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

AUSTIN DIVISION

IRENE SIMON	*	
	*	
VS.	*	CIVIL NO. A-88-CA-728
	*	
NORBERT SIMON, ET. AL.	*	

ORDER

Before the Court is Plaintiff's March 3, 1989 Petition for Clerk's Default Judgment, as well as Plaintiff's March 3, 1989 Objections to Judge James R. Nowlin's Failure to Render Default Judgment. This is the third motion for default judgment filed by Plaintiff, and the third that the Court will deny. Plaintiff is obviously unhappy with the Court's ruling, but it is a ruling she must tolerate at this time. Plaintiff shall not file any additional motion seeking entry of default judgment, but shall proceed with her case on the merits.

ACCORDINGLY, IT IS ORDERED that Plaintiff's Petition for Clerk's Default Judgment is DENIED.

IT IS FURTHER ORDERED that all relief sought through Plaintiff's Objections to Judge James R. Nowlin's Failure to Render Default Judgment is DENIED.

SIGNED AND ENTERED this 8th day of March, 1989.

JAMES R. NOWLIN
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

AUSTIN DIVISION

IRENE SIMON	*	
	*	
VS.	*	CIVIL NO. A-88-CA-728
	*	
NORBERT SIMON	*	
ET. AL.	*	

ORDER

At the time of filing the above captioned cause, counsel for the plaintiff, or the unrepresented plaintiff, was provided a Notice Regarding Entry of Scheduling Order, which was to be served with the summons and complaint upon the defendant(s) in this cause.

Said Notice required counsel to recommend to the court, within 10 days after the filing of the answer, and not later than 90 days after filing of the Complaint, proposed time limits to:

1. Join other parties and amend pleadings;
2. File and hear motions;
3. Complete discovery;
4. Hold a conference of attorneys; and
5. submit a proposed pre-trial order.

It has come to the Court's attention that said proposed scheduling order has not been filed; therefore

It is ACCORDINGLY ORDERED that counsel for all parties shall file, with the Clerk, said proposed scheduling order within 10 days from entry of this order.

If counsel do not file a Proposed Scheduling Order within 10 days, the Court will find it necessary to enter its own Scheduling Order setting forth minimal time limits.

Entered this 6th day of March, 1989.

JAMES R. NOWLIN
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

AUSTIN DIVISION

IRENE SIMON	*	
	*	
VS.	*	CIVIL NO. A-88-CA-728
	*	
NORBERT SIMON, ET. AL.	*	
	*	

ORDER

Before the Court is Plaintiff's February 2, 1989 Motion of Interlocutory Default Judgment. On February 1, 1989, the Court denied Plaintiff's previously filed Petition for Clerk's Default Judgment. The Court is of the opinion that Plaintiff's new motion should also be Denied.

ACCORDINGLY, IT IS ORDERED that Plaintiff's Motion of Interlocutory Default Judgment is DENIED.

SIGNED AND ENTERED this 3rd day of March, 1989.

JAMES R. NOWLIN
UNITED STATES
JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

AUSTIN DIVISION

IRENE SIMON	*	
	*	
VS.	*	CIVIL NO. A-88-CA-728
	*	
NORBERT SIMON ET. AL.	*	

ORDER

Before the Court is Plaintiff's December 28, 1988 Petition for Clerk's Default Judgment. The Court notes that this action, brought pursuant to 42 U.S.C. #1983, is not one in which the Clerk may enter default judgment pursuant to Federal Rule of Civil Procedure 55(b) (1). Furthermore, the Court notes that the Defendants against whom Plaintiff seeks the entry of default judgment, Hylon Adams and Travis County, Texas, filed answers on December 27, 1988 and January 6, 1989, respectively. Given the strong

preference for resolving disputes on the merits, and not on default judgment. Azzopardi v. Ocean Drilling & Exploration Co., 742 F.2d 890, 895 (5th Cir. 1984), the Court is of the opinion that the Plaintiff's Petition for Clerk's Default Judgment should be Denied.

ACCORDINGLY, IT IS ORDERED that Plaintiff's Petition for Clerk's Default Judgment is DENIED.

SIGNED and ENTERED this 1st day of February, 1989.

JAMES R. NOWLIN
UNITED STATES
DISTRICT JUDGE

CERTIFICATE OF SERVICE

I certify that three (3) true and correctcopies of the Appellant's Writ of Certiorariare being sent to the following:

Mr. Hylon Adams
708 Colorado
Brown Building, Suite 613
Austin, TX 78701
(512) 472-7736

Ms. Carolyn Whisenhunt
910 West Avenue
Austin, TX. 78701
(512) 477-7232

Mr. John Dickson
P. O. Box 1748
Austin, TX. 78767
(512) 473-9415

Mr. Mark Levbarg
910 West Avenue
Austin, TX. 78701
(512) 477-4983

Messrs. Ken Oden/Jim McCormack
P. O. Box 1748
Austin, TX. 78767
(512) 473-9415

The United States Court of Appeals
for the Fifth Circuit
606 Camp Street
New Orleans, LA. 70130
(504) 589-6514

Respectfully submitted on this the 18th day of October, 1991.

Irene Simon

Irene Simon
10414 Slaughter Creek Dr.
Austin, TX. 78748
(512) 282-6250

THE STATE OF TEXAS *

*

COUNTY OF TRAVIS *

SUBSCRIBED TO AND SWORN TO BEFORE ME, an officer authorized to administer oath by the said Irene Simon, and officially certified by me under my seal of office on this 18th day of October, 1991, to certify which witness my hand and seal of office.

Peggy A Smith

NOTARY PUBLIC, STATE OF TEXAS

My Commission expires: 3-13-93

Peggy A Smith

Name typed/printed